IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1515

THE LONG ISLAND RAIL ROAD COMPANY,
Petitioner,

v.

ABERDEEN & ROCKFISH RAILROAD COMPANY, *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

LLOYD N. CUTLER
LOUIS R. COHEN
ROBERT B. MCCAW
HELEN I. BENDIX
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner, The Long Island Rail Road Company

Of Counsel:

GEORGE M. ONKEN
RICHARD H. STOKES
Jamaica Station
Jamaica, New York 11435

WALTER J. MYSKOWSKI
707 Ring Building
Washington, D.C. 20036

April 24, 1978

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

INDEX

TABLE OF AUTHORITIES

CASES:

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. ———

THE LONG ISLAND RAIL ROAD COMPANY,
Petitioner,

v.

ABERDEEN & ROCKFISH RAILROAD COMPANY, *et al.,*
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INTRODUCTION

On March 6, 1978, in No. A-688, this Court granted the application of petitioner The Long Island Rail Road Company ("LIRR")[1] for a stay, pending the filing and disposition of this petition, of the judgment of the United States Court of Appeals for the Fifth Circuit insofar as it deprived the LIRR of the use of a 12.5% interim terminal surcharge.

The LIRR now asks this Court to grant certiorari to review the decision of the Court of Appeals vacating and remanding the Interstate Commerce Commission ("ICC") order that approved the LIRR's permanent terminal sur-

[1] The LIRR is a wholly owned subsidiary of the New York Metropolitan Transportation Authority, a New York public benefit corporation that receives substantial grants from federal, state and local governments.

charge. In the alternative, the LIRR requests the Court to grant certiorari and summarily reverse the decision of the Court of Appeals insofar as that decision deprives the LIRR of the use of the proceeds of the interim surcharge before there is a final determination on the LIRR's request for a permanent rate increase.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals (App. A) is reported at 565 F.2d 327. The Second Supplemental Report and Order of the Interstate Commerce Commission (App. B) are reported at 350 I.C.C. 673, 705 (1975), and the ICC order on reconsideration (App. C) is dated November 23, 1976. The opinion of the three-judge court in *Long Island Rail Road* v. *United States* (App. D) is reported at 388 F. Supp. 943. This Court's order on the LIRR's Application for Stay (App. E) is dated March 6, 1978.

JURISDICTION

The judgment of the Court of Appeals (App. A) was entered on December 27, 1977, and a timely petition for rehearing was denied by order (App. F), dated January 25, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Did the Court of Appeals thwart the purpose of the Railroad Retirement Amendments and frustrate the final judgment of a three-judge court when it deprived the LIRR of the immediate use of its interim terminal surcharge?

2. Did the decision of the Court of Appeals to vacate and remand the ICC's approval of the LIRR's permanent rate increase—

(a) improperly disregard the language and intent of the Railroad Retirement Amendments permitting railroads to recover their increased railroad retirement tax obligations from increased interstate freight rates;

(b) improperly ignore the finding of the ICC that there was no other feasible way for the LIRR to obtain additional revenue to meet its increased railroad retirement tax obligations; and

(c) impose additional burdens on taxpayers who already subsidize LIRR freight services?

3. Did the Court of Appeals misapply the statute governing the divisions of joint rates and thereby deprive the LIRR of prompt approval of an interstate freight rate increase specifically authorized by Congress?

STATUTORY PROVISIONS INVOLVED

The Railroad Retirement Amendments of 1973, Pub. L. 93-69, 87 Stat. 162, and the statute governing divisions of joint rates, 49 U.S.C.A. § 15(6) (Supp. 1977), are reproduced in App. G.

STATEMENT

In 1973, Congress enacted the Railroad Retirement Amendments of 1973 ("RR Amendments"), Pub. L. 93-69, 87 Stat. 162 (App. G). These amendments required railroads to increase their tax contributions to the Railroad Retirement Fund for all employees of every railroad engaged in interstate freight operations, including employees engaged solely in local operations.[2] As part of the same enactment, Congress amended the Interstate Commerce Act to permit railroads, individually or by groups,

[2] 45 U.S.C. § 228a(b) (1970), *as revised* by the Railroad Retirement Act of 1974, Pub. L. 93-445, 88 Stat. 1305 (current version at 45 U.S.C. § 231(b) (Supp. V 1975)).

to pass the cost of this tax increase on to customers of their interstate freight service.[3]

Mindful of substantial revenue losses caused by ICC delays in approving railroad rate increases, Congress directed virtually automatic ICC approval of interim rate increases to offset the increased retirement taxes.[4] Congress also established procedures for ICC approval of permanent rate increases under the RR Amendments.[5] With respect to these permanent increases, Congress made it clear that while the ICC could authorize general increases, it also had authority to take into account the financial condition of a particular carrier.[6]

Railroads other than the LIRR petitioned for a general increase in their freight rates of 2.0% effective October 1, 1973, and 2.7% effective January 1, 1974, to offset their increased railroad retirement taxes. But the LIRR had a special problem. The LIRR derives approximately 90% of its revenue from intrastate passenger service and only 10% from interstate freight service. While the RR Amendments required the LIRR to increase its retirement tax contributions on behalf of all employees, including those engaged in intrastate passenger operations, the RR Amendments authorized an interim rate increase in inter-

[3] 49 U.S.C.A. § 15a(6) (Supp. 1977), Pub. L. No. 93-69, § 201(4), 87 Stat. 166-68 (App. G).

[4] 49 U.S.C.A. § 15a(6)(b) (Supp. 1977), Pub. L. No. 93-69, § 201(4), 87 Stat. 166 (App. G).

[5] Congress provided that in making this determination, the ICC "may take into account all factors appropriate to ratemaking generally under this chapter and shall determine such final rates under the standards and limitations applicable to ratemaking generally under this chapter." 49 U.S.C.A. § 15a(6)(c) (Supp. 1977), Pub. L. No. 93-69, § 201(4)(c), 87 Stat. 166-67 (App. G).

[6] For example, the Senate Commerce Committee stated: "While the present financial conditions of some carriers may justify 'pass through' of the expense increases, this may not be the case with all carriers." S. Rep. No. 93-221, 93d Cong., 1st Sess. 3 (1973).

state freight rates. Because of the LIRR's small percentage of interstate operations, a general freight rate increase equivalent to that sought by other railroads would have recovered only approximately $269,000 of the LIRR's more than $6 million increase in annual retirement tax obligations.

To obtain the revenue needed to offset its increased taxes, the LIRR sought permission to impose a different form of interim increase in interstate freight rates: a terminal surcharge on all interstate freight originating or terminating on the LIRR system. The ICC rejected the LIRR's interim terminal surcharge on the ground that the surcharge was not an appropriate method of effecting the interim rate increase. Increases in Freight Rates and Charges to Offset Retirement Tax Increases-1973, 346 I.C.C. 305 (1973).

A three-judge court in the Eastern District of New York reversed this decision and, over the objections of most of the railroad parties to this case, required the ICC to accept the LIRR's interim terminal surcharge. *Long Island Rail Road* v. *United States*, 388 F. Supp. 943 (E.D. N.Y. 1974) (App. D). No party appealed from the ruling of the three-judge court, and it became the final decision governing the LIRR's interim rates pending final determination of the LIRR's permanent rate increase.

Subsequently, the ICC allowed the LIRR to increase its interim surcharge to 12.5%.[7] At this level, the surcharge falls slightly short of providing sufficient revenue to cover the LIRR's increased retirement tax costs. Even with the surcharge, the LIRR's interstate freight operations generate a deficit[8] which is offset solely by public grants from the State of New York. To illustrate the magnitude

[7] The surcharge was 3.5% beginning October 8, 1973; 5.5% beginning January 1, 1974; and 12.5% beginning December 19, 1974.

[8] 350 I.C.C. at 711 (App. B 51b).

of this burden, the LIRR's freight operations for calendar 1976 had gross revenues of approximately $12,000,000 (excluding approximately $6,800,000 in receipts from the interim surcharge used to cover increased retirement taxes for passenger service) and gross expenses of approximately $28,450,000. New York taxpayers shouldered the resulting cash deficit of approximately $16,450,000.

When the LIRR's 12.5% surcharge is added to the existing joint rates, interstate shippers pay no more to ship to LIRR points than to nearby points served by other railroads. This circumstance, coupled with the fact that the LIRR's charges, including the surcharge, are insufficient to cover the costs of the LIRR's freight operations, may explain why no shipper is now protesting the surcharge.

In addition, Consolidated Rail Corporation ("ConRail") has agreed to the LIRR's tariffs, including the surcharge. Most of the northern railroads do not object to the surcharge. Only the southern and western railroads[9]—already subsidized by New York's taxpayers—challenge the surcharge. These railroads seek to impose even greater burdens upon the LIRR and the taxpayers who support it.

Late in 1976, following full hearings, the ICC approved the LIRR's petition for a permanent 12.5% terminal surcharge.[10] The ICC did so only after rejecting a plan, acceptable to the LIRR, for pooling a general rate increase so that every railroad would have received additional reve-

[9] The Norfolk & Western Railway Company joined the southern and western railroads before the Court of Appeals. The Chesapeake & Ohio Railway and the Baltimore & Ohio Railroad intervened in the Court of Appeals and concurred in the briefs filed by the southern and western railroads.

[10] The ICC first approved the permanent surcharge on October 15, 1975 in a Second Supplemental Report and Order, 350 I.C.C. 673, 705 (1975) (App. B 1b, 44b), but this order did not become effective until after the ICC denied a petition for reconsideration on November 23, 1976 (App. C).

nues sufficient to cover its increased railroad retirement taxes and none would have received a windfall profit. 350 I.C.C. at 676, 708 (App. B 5b, 48b). In approving the surcharge, the ICC rejected a claim that the LIRR's intrastate passenger operations or its stockholder should bear the LIRR's increased railroad retirement tax obligations:

> In many general increase proceedings, we have held that if the passenger service, inevitably and inescapably, could not bear its direct costs or its share of joint or indirect costs, such passenger deficit must be taken into account in adjustment of freight rates and charges. *We reach the same conclusion in regard to the terminal surcharge of the Long Island*, and find that there is nothing unlawful in using it to offset its total increased retirement taxes, including those of employees engaged in commuter and other passenger service. 350 I.C.C. at 715 (App. B 57b) (emphasis added).

Thus, the ICC made an explicit finding that the LIRR's passenger service would "inevitably and inescapably" fail to bear its costs and that the LIRR should recover its increased taxes out of interstate freight rates as Congress had intended.

The ICC recognized that the LIRR's terminal surcharge would increase both the total transportation charges on traffic to or from the LIRR system and the LIRR's resulting fractional share of such total charges. But the ICC found that the surcharge did not constitute an illegal change in divisions of joint rates and was justified—indeed, necessitated—if the LIRR were to recoup its increased costs as authorized by Congress without giving other carriers a windfall.

First, the ICC recognized that the LIRR occupied a "unique" position. The LIRR's participation in the general increase allowed the other railroads would not have produced the revenue needed to offset its increased rail-

road retirement taxes, particularly since the other carriers had opposed a pooling arrangement under which every carrier would have recovered its increased retirement taxes and no more. 350 I.C.C. 676, 708 (App. B 5b, 48b). Second, the ICC recognized that the LIRR needed a general rate increase of at least 37.5 percent to recoup its added retirement taxes solely through its division of joint line haul rates. 350 I.C.C. 706 (App. B 44b). Obviously such an increase would have given the other carriers a huge windfall and would have been inconsistent with the public interest in maintaining fair rates for shippers. Third, the ICC found that the LIRR's terminal surcharge was a separate add-on charge which did not affect the amount of revenue other carriers received from existing joint rates and therefore did not illegally alter the divisions of joint rates.[11]

The western and southern railroads petitioned the United States Court of Appeals for the Fifth Circuit to review the ICC order. The Court of Appeals, per Senior District Judge Wyzanski, set aside the ICC order and remanded the matter to the ICC. The Court of Appeals held that the ICC had failed to provide a "reasoned explanation" for declining to impose the retirement tax burden on intrastate passenger operations or on the LIRR stockholder. 565 F.2d at 335 (App. A 12a-14a). In the alternative, although the Court of Appeals acknowledged that the LIRR surcharge did not change the divisions of joint rates within the meaning of the language in 49 U.S.C.A. § 15(6) (Supp. 1977) (App. G), it nevertheless held that the ICC decision had the economic effect of altering the divisions of joint rates and lacked the support of findings justifying that economic effect. 565 F.2d at 335 (App. A 12a-15a).

[11] Joint rates are defined by ICC regulation to include only those rates agreed to by the participating carriers and do not necessarily include all charges that a shipper pays in shipping from one point to another. 49 C.F.R. §§ 1300.0(b)(3), 1310.0(f)(16) (1976).

The Court of Appeals restored the LIRR's interim 12.5% terminal surcharge pending the ICC's ultimate approval of a permanent rate increase.[12] Then, *sua sponte* and without explanation, the Court of Appeals ordered the LIRR to keep "all sums hereafter received as a consequence of the 12.5 percent interim surcharge" in a separate trust fund. 565 F.2d at 335 (App. A 16a). The Court of Appeals made no effort to reconcile its trust fund requirement with the judgment of the three-judge court which entitled the LIRR to collect the interim surcharge and to use the proceeds to pay the increased taxes already due under the RR Amendments.

On February 14, 1978, after exhausting its remedies before the Court of Appeals, the LIRR applied to this Court for a stay of the Court of Appeals' judgment pending the LIRR's timely filing of a petition for certiorari. On March 6, 1978, this Court stayed the judgment of the Court of Appeals pending consideration of this petition insofar as the Court of Appeals directed the LIRR to keep the proceeds of the 12.5% interim surcharge in a separate trust fund (App. E).

REASONS FOR GRANTING THE WRIT

There are compelling reasons for this Court to grant certiorari and summarily reverse the Court of Appeals' decision to impose a trust fund on the LIRR's *interim* terminal surcharge. A three-judge court expressly approved the LIRR's collection and use of the proceeds of the interim terminal surcharge in a decision that is now final.[13] The ICC and the United States have advised this

[12] The Court of Appeals ordered all railroads to incorporate the LIRR's 12.5% interim surcharge into their tariffs for shipments to and from points on the LIRR.

[13] *Long Island Rail Road* v. *United States*, 388 F. Supp. 943 (E.D.N.Y. 1974) (App. D). All of the protesting railroads had an opportunity to intervene in the proceeding before the three-judge court. Some of them did so, but no party appealed.

Court that "the interim surcharge approved by the three-judge court was to remain effective until a permanent surcharge was in place" and that there was "no basis in these circumstances for the court of appeals to impress a trust on the proceeds of this surcharge." [14]

The LIRR, the ICC and the United States are supported in this view by both the express language and the legislative history of the RR Amendments. Congress considered the possibility that interim rates might exceed the permanent rates finally approved by the ICC, but declined to give the ICC power to impose an escrow to solve this problem.[15] Instead, Congress gave the ICC authority to refund the amount, if any, that the interim rate increase exceeded the permanent rate ultimately approved by the ICC.[16] Clearly, Congress intended the railroads to have the use of the proceeds of the interim rate increase until there was a final determination on a permanent rate increase,[17] and we submit that this Court

[14] Memorandum for the United States and the Interstate Commerce Commission, filed in this Court on March 1, 1978, at p. 2 n.2, p. 3 n.6.

[15] The Conference Report of the RR Amendments states:

> The Commission could withhold permission to file tariffs if it found that the proposed increase clearly exceeded the amount needed to cover the increases in costs, but otherwise once the tariffs were filed[,] the Commission would have *no* authority to suspend them pending final determination.

Joint Explanatory Statement of the Committee of the Conference, H.R. Rep. No. 93-319, 93d Cong., 1st Sess. 12 (1973) (emphasis added).

[16] 49 U.S.C.A. § 15a(6)(c), Pub. L. No. 93-69, § 201(4)(c), 87 Stat. 166-67 (App. G).

[17] The Court of Appeals' escrow order does not protect any party to this case. The carriers that object to the LIRR's terminal surcharge do not pay the surcharge and have no equitable interest in depriving the LIRR of the immediate use of badly needed operating funds. Accordingly, they do not have a claim against the trust fund ordered by the Court of Appeals.

[Footnote continued on page 11]

so recognized when it granted the LIRR's Application for Stay (App. E).

There are also compelling reasons why this Court should grant certiorari to review the Court of Appeals' decision in its entirety. In drafting the RR Amendments, Congress had to accommodate several conflicting interests: the railroad workers' need for increased pension benefits, the commensurate revenue demands of railroads participating in a pension scheme threatened with bankruptcy [18] and the consumer's interest in preserving railroad routes in precarious financial condition. To make this accommodation, Congress authorized specific rate increases to fund the increased retirement tax obligations imposed by the RR Amendments and established expedited procedures to guarantee that these increases would be forthcoming.

At the instance of railroads having no claim to any part of the LIRR surcharge, the Court of Appeals upset

[17] [Continued]

Shippers pay the LIRR's surcharge, but no shipper has sued to bar collection of the surcharge. No shipper is even a party to this proceeding. And if a shipper were a party, its equitable claim would not be a strong one. Even with the addition of the surcharge, shippers pay no more to ship to LIRR points than to other points in the New York City rate group.

It is the taxpayer who would be injured by the escrow. Even with the surcharge, the LIRR's freight operations generate a substantial deficit that is made up by subsidies from New York State. A refund to shippers of the surcharge held in trust would only increase the public subsidy that they already receive when they ship to LIRR points.

[18] "Rapidly declining levels of employment in the railroad industry in recent years have brought about a situation in which there are 1.6 people drawing benefits each month from the railroad retirement fund for every one person paying taxes into the fund . . . . As a result, income to the program is less than outgo, and if benefits are continued at present levels and if no additional revenues are provided, the railroad retirement system will be bankrupt in the mid-1980's." H.R. Rep. No. 93-204, 93d Cong., 1st Sess. 5 (1973).

that balance. In doing so, the Court of Appeals misconstrued both the RR Amendments and its own role in reviewing an expert agency's administrative determination.[19] Unless this Court corrects these errors, they will endanger future Congressional efforts to force administrative agencies, here the ICC, to respond promptly to the difficult problems that confront our transportation systems.

This case cries out for this Court's intervention in the name of equity. This case pits the southern and western railroads, among the largest and most profitable in the Nation, against a small, deficit-ridden railroad supported by taxpayers. The big railroads entered into an agreement to help solve their labor problems by increasing railroad retirement taxes on all railroad employees.[20] As the *quid pro quo* for agreeing to higher retirement taxes, the big railroads obtained labor support for immediate pass-through of the increased retirement taxes on all railroad employees, including employees engaged solely in local operations, to *interstate freight* shippers. Based on this agreement, Congress enacted the RR Amendments.

When the ICC, acting pursuant to the RR Amendments, directed the carriers to submit a plan to pool a

---

[19] " 'The process of rate making is essentially empiric. The stuff of the process is fluid and changing—the resultant of factors that must be valued as well as weighed. Congress has therefore delegated the enforcement of transportation policy to a permanent expert body and has charged it with the duty of being responsive to the dynamic character of transportation problems.' " *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 806 (1973) *quoting, Board of Trade of Kansas City* v. *United States*, 314 U.S. 534, 546 (1942). See also *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, —— U.S. ——, 46 U.S.L.W. 4301 (U.S. April 3, 1978) (No. 76-419).

[20] Agreement Between Railway Labor and Management Initialed March 7, 1973, reprinted as Appendix A to S. Rep. No. 93-202, 93d Cong., 1st Sess. 35 (1973).

general rate increase to prevent some carriers from recovering more than their added retirement tax expenses While others recovered less, the big railroads resisted. 350 I.C.C. at 676 (App. B 5b). As a reward for their resistance, the southern railroads were not only permitted to include the increased taxes on their employees engaged in local operations but also to receive a \$2.2 million annual windfall. 350 I.C.C. at 676 (App. B 6b).

Since the 2.7% general rate increase supported by the big railroads would have allowed the LIRR to recoup less than 5% of its increased railroad retirement taxes, it was forced to request its own surcharge. The LIRR, however, offered to cancel its surcharge, if the other carriers agreed to a pooling plan that would have permitted every carrier to recover only its increased retirement taxes and would have prevented any carrier from achieving a windfall. 350 I.C.C. at 708 (App. B 48b). Not only did the southern and western railroads oppose such an equitable plan; not only do they now seek to bar the LIRR from receiving the same favorable pass-through treatment from which they have benefited;[21] they have also concocted a "divisions" argument to add to their own windfall profits by claiming a part of the LIRR's surcharge.

This Court should grant certiorari and reverse the recognition below of such a wholly unjustified and inequitable claim.

---

[21] The southern and western railroads secured Congressional approval of the RR Amendments by entering into and presenting to Congress an agreement that the increases in railroad retirement costs would be offset by "prompt freight rate increases." These railroads have offset the retirement taxes attributable to their intrastate employees against interstate freight rates. They should be estopped from arguing that the LIRR cannot do the same thing.

UNDER THE GUISE OF JUDICIAL REVIEW, THE COURT OF APPEALS MISCONSTRUED THE RR AMENDMENTS AND SUBSTITUTED ITS JUDGMENT FOR THAT OF AN EXPERT AGENCY.

The Court of Appeals set aside the ICC's order for failure to achieve "reasoned compliance" with 49 U.S.C.A. § 15a(6)(c) added by the RR Amendments, which requires the ICC to employ "standards and limitations applicable to ratemaking generally" in approving permanent rate increases. In the court's view, the ICC departed from ordinary ratemaking principles, because it had failed to determine whether the LIRR's intrastate service could bear its own costs through increased passenger fares or whether the LIRR stockholder would absorb the increased retirement tax costs.

There are two fatal deficiencies in the court's analysis. First, under the RR Amendments, the ICC was not required to make these findings. Second, the ICC did in fact make these findings.

Pursuant to the agreement between railway labor and management, Congress authorized the railroads to recover their increased retirement tax obligations from higher *interstate freight* rates.[22] Interstate freight service was to bear the financial burden of the RR Amendments notwithstanding the fact that some of the increased costs were attributable to employees in intrastate passenger service.

[22] Agreement Between Railway Labor and Management Initialed March 7, 1973, reprinted as Appendix A to S. Rep. No. 93-202, 93d Cong., 1st Sess. 35 (1973).

See also S. Rep. No. 93-221, 93d Cong., 1st Sess. 5 (1973) ("[T]he bill . . . would provide for prompt freight rate increases to cover increases in expenses occasioned by higher railroad retirement taxes to the extent that such increases are justified."); S. Rep. No. 93-202, 93d Cong., 1st Sess. 4 (1973); H.R. Rep. No. 93-204, 93d Cong., 1st Sess. 7-8 (1973); and H.R. Rep. No. 93-319, 93d Cong., 1st Sess. 13 (1973) (The Conference Committee Report noted that the legislation "incorporates the provisions of the House bill with respect to increases in interstate freight rates . . . .").

Congress considered the extent to which *intrastate* rates should be increased to help offset the railroads' increased retirement tax costs. It rejected a House proposal that would have made interstate rate increases "concurrently effective" on intrastate rates.[23] Instead, Congress left the decisions concerning intrastate rate increases to railroad management and state regulatory authorities, subject to ICC review under stringent standards. The ICC was authorized to overturn the decisions of railroad managers and state officials regarding intrastate rates only when the ICC could find that the intrastate rate unreasonably discriminated in favor of intrastate commerce or that it unduly burdened interstate commerce.[24]

Such findings would be precluded in this case. The LIRR is not seeking to subsidize its intrastate passenger services by increasing interstate freight rates. It is undisputed that even with the surcharge, the LIRR's freight operations generate a deficit[25] that is subsidized by New York's taxpayers. Nor does the surcharge burden interstate commerce because shippers pay no more to ship to LIRR points than to other points in the New York City rate group.

The Court of Appeals also erred in holding that the ICC had failed to determine whether the LIRR's passenger fares could be increased to meet the increased railroad retirement taxes or whether its stockholder would bear the costs. The record reveals that the ICC considered passing the increased retirement tax costs on to intrastate

[23] H.R. Rep. No. 93-319, 93d Cong., 1st Sess. 12-14 (1973).

[24] 49 U.S.C.A. § 15a(6)(d)(C) (Supp. 1977), Pub. L. No. 93-69, § 201(4)(d)(C), 87 Stat. 167 (App. G).

[25] 350 I.C.C. at 711 (App. B 51b).

passenger service or to the LIRR stockholder, and that it correctly rejected those alternatives.

In disposing of the first alternative, the ICC found that recent requests for increased commuter fare increases based on inclusions of increased retirement costs had been denied. 350 I.C.C. at 714 (App. B 56b). More importantly, it found that the LIRR's passenger service "inevitably and inescapably could not bear its direct costs or its share of joint or indirect costs." 350 I.C.C. at 715 (App. B 57b). The ICC finding was supported by the following evidence:

(a) The LIRR had a total passenger operating deficit of approximately $108 million in 1974. 350 I.C.C. at 714 (App. B 56b).

(b) To the extent that the LIRR could obtain additional revenues from an intrastate passenger fare increase, the revenue "would be needed to combat that deficit." 350 I.C.C. at 714 (App. B 56b).

(c) The LIRR would have to double its passenger fares to make up its passenger revenue deficit.[26]

(d) Such a large passenger fare increase would cause a loss of ridership and would thus be "self-defeating." [27]

(e) The LIRR's freight operations would continue to operate at a deficit, even with the surcharge. 350 I.C.C. at 711 (App. B 52b).

Moreover, the ICC found that the other railroads had "not excluded the increased retirement taxes of their employees engaged in commuter or other passenger service" in computing the amount of their interstate freight rate increases. 350 I.C.C. at 714 (App. B 56b).

---

[26] Testimony of Thomas P. Moore, Treasurer-Comptroller of the LIRR, before an ICC administrative law judge, February 10, 1975, Transcript of Hearings before the ICC, at 47.

[27] *Id.*; The LIRR's Verified Supplemental Petition, served November 6, 1974, at 4.

The Court of Appeals' second alternative—that the LIRR stockholder should bear the increased retirement tax burden—speaks more of irony than administrative deficiency. The LIRR's parent, the New York Metropolitan Transportation Authority, is able to meet the LIRR's operating deficits only because it receives financial assistance from federal, state and local governments. To accept the Court of Appeals' second alternative would be to shift payment of the increased retirement tax from railroad ratepayers to the public taxpayers who already subsidize the LIRR's freight operations.

In short, only a court determined to substitute its own judgment for the well-considered judgment of an expert administrative agency could have concluded that the ICC's report lacked "reasoned explanation." To hold otherwise would be "to deprive those words of any meaning." *Vermont Yankee Nuclear Power Corp.* v. *Natural Resources Defense Council, Inc.*, —— U.S. ——, 46 U.S.L.W. 4301, 4310 (U.S. April 3, 1978) (No. 76-419).

THE COURT OF APPEALS MISAPPLIED THE STATUTE GOVERNING DIVISIONS AND THEREBY CONTRAVENED THE ACT, THE TEACHINGS OF THIS COURT AND TRADITIONAL RATEMAKING PRINCIPLES.

In the alternative, the Court of Appeals held that the LIRR surcharge had the economic effect of altering the equal-factor basis of divisions of joint rates. Proceeding from this characterization, the Court held that the ICC had failed to make the findings required in *Baltimore & Ohio R.R. Co.* v. *Aberdeen & Rockfish R.R. Co.*, 393 U.S. 87 (1968).

Certainly the proper allocation of revenues from joint haul freight service is within the ICC's administrative

expertise.[28] The role of courts in reviewing an ICC divisions determination is a limited one. This Court has confined the Court of Appeals' inquiry to a determination that the ICC acted in conformity with its statutory mandate.[29]

The ICC's mandate in this case permitted it to approve permanent rate increases that have the economic effect of altering the division of total transportation charges. To hold otherwise would deprive the ICC of the power to approve anything other than general rate increases, because only general rate increases exactly preserve the existing breakout among carriers of total transportation charges for hauls from a point on one line to a point on another. The legislative history, as well as the text, of the RR Amendments unequivocally establishes that the ICC had not only the power, but the obligation, to deviate from general increases to the extent necessary to preserve a fair rate structure or to prevent a windfall to any carrier.[30] For example, the Senate Commerce Committee cautioned the ICC that "[w]hile the present financial conditions of some carriers may justify 'pass through' of the expense increases, this may not be the case with all carriers."[31] And even in discussing general rate increases the Committee cautioned that they do not " 'preclude variability of application.' "[32]

---

[28] *Chicago & North Western Ry. Co.* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 387 U.S. 326, 348 (1967).

[29] *Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800, 806 (1973).

[30] If every deviation from a general rate increase required a cumbersome divisions hearing, the ICC would not be able to discharge its obligations under the RR Amendments in the expedited manner directed by Congress.

[31] S. Rep. No. 93-221, 93d Cong., 1st Sess. 3 (1973).

[32] *Id., quoting*, Ex. Parte No. 281, Increased Freight Rates and Charges, 341 I.C.C. 288, 331 (1972).

Furthermore, the record refutes the Court of Appeals' conclusion that the ICC's findings on the divisions point were insufficient.[33] The ICC considered employing the usual divisions method to allow the LIRR to recoup its increased tax expenses and rejected it.[34] As the Court of Appeals itself recognized,[35] the ICC did not use the divisions method because it would have required at least a 37.5% increase in all joint freight rates involving the LIRR and would have granted a formidable windfall to other railroads. Certainly, the ICC adhered to its mandate in declining to approve such a windfall.

Stripped of its rhetoric, the "divisions" argument is that the southern and western railroads ought to be permitted to charge rates in excess of those needed to recover their retirement tax obligations and in excess of those allowed by the ICC, while the LIRR is deprived of the minimum rate increase necessary to recover its increased retirement tax obligations. It is an argument so inequitable and unjust that it should fail of its own weight.

---

[33] In any event, the principle of divisions is technically inapplicable to the LIRR's proposed surcharge. The LIRR surcharge does not alter the amount of any joint rate or the percentage of that rate owing to any carrier serving LIRR points. Nor does the surcharge represent a separate charge for service that had been previously included in any joint rate. *Cf. Atchison, Topeka & Santa Fe Ry. Co.* v. *Wichita Board of Trade*, 412 U.S. 800 (1973); *Secretary of Agriculture* v. *United States*, 347 U.S. 645 (1954). Instead, the surcharge is a specific increase authorized by Congress to offset a specific retirement tax increase.

[34] Instead, the ICC conditioned the other railroads' right to the general rate increase they sought upon publication of tariffs incorporating the LIRR terminal surcharge on shipments to or from LIRR points. This Court has upheld the ICC's power to impose conditions on general rate increases. *United States* v. *Chesapeake & Ohio Ry Co.*, 426 U.S. 500 (1976).

[35] 565 F.2d at 332 (App. A 9a).

CONCLUSION

For the reasons stated above, the LIRR requests this Court to issue a writ of certiorari to review the decision of the Court of Appeals vacating the ICC approval of the LIRR permanent terminal surcharge. In the alternative, the LIRR asks the Court to issue a writ of certiorari and summarily reverse the Court of Appeals' "trust fund" order so that the LIRR may continue to use the proceeds of its interim terminal surcharge until there is a final determination on the LIRR's permanent rate increase under the RR Amendments.

Respectfully submitted,

LLOYD N. CUTLER
LOUIS R. COHEN
ROBERT B. MCCAW
HELEN I. BENDIX
WILMER, CUTLER & PICKERING
1666 K Street, N.W.
Washington, D.C. 20006

Attorneys for Petitioner,
The Long Island Rail Road Company

Of Counsel:

GEORGE M. ONKEN
RICHARD H. STOKES
Jamaica Station
Jamaica, New York 11435

WALTER J. MYSKOWSKI
707 Ring Building
Washington, D.C. 20036

April 24, 1978